CLAUDE W. BOWLIN

IBLA 70-36 Decided September 25, 1970

Public Lands: Special Land Use Permits

It is proper to reject an application for a special land use permit on a tract of land which the state office intends to use in an exchange if the use of the land for a business under the permit would make it more difficult to consummate an exchange.

Public Lands: Special Land Use Permits -- Small Tract Act: Lands Subject to

Where an application for a tract of land would be rejected either under the Small Tract Act or for a special land use permit, it is not necessary to determine under which procedure the land should be disposed of when it is decided that the special land use permit actually filed was properly rejected.

1 IBLA 32

IBLA 70-36 : N.M. 035560

CLAUDE W. BOWLIN : Application for renewal of
: special land use permit rejected
: Affirmed

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Claude W. Bowlin has appealed to the Secretary of the Interior from a decision dated February 11, 1970, of the Office of Appeals and Hearings, Bureau of Land Management which affirmed, as modified, the denial of his application for the renewal of a special land use permit to use a 5 acre tract of land situated on U.S. Highway 70-80 six miles west of Las Cruces, New Mexico, as a site for a curio shop, gasoline station and lunch counter.
A permit authorizing such activities had been issued as early as June 1, 1952. Bowlin first as an assignee as of January 21, 1955, and then as a permittee, carried on these activities until February 1, 1967, when he, in turn, assigned his permit to Western Oil Company. On May 15, 1967, shortly before the expiration of the permit on June 18, 1967, Western filed an application for renewal for another five year term. Thereafter it appears that an option contract by which Bowlin was to sell Western the improvements on the land expired and was not renewed. On August 13, 1968, Bowlin then filed his own application asking for a five year renewal of the permit to himself.

In two separate decisions dated November 7, 1968, the district office rejected both applications on the grounds that the uses to which the land had been put were not temporary in nature, were not in accord with a prohibition placed on the issue of such permits by the pertinent regulation 43 CFR Subpart 2236, as revised, 1/ and did not constitute the highest and best use of the land. The district office noted that an interchange on the interstate highway had been completed just west of the property and that as a result the value of the land had greatly increased. It also pointed out that the Highway Beautification Act of 1965 (23 USC, Supp. V, § 131) now regulates the types of usage the Bureau can authorize on Federal lands within 660 feet of the National System of Highways, and that the regulations, supra, have been revised to conform with the Act of 1965. It also concluded that the original

1/ Now 43 CFR Subpart 2920, 35 F.R. 9667 (1970).

improvements on the land belonged to the U.S., that the appellant or his predecessors had improved the land without permission, and that the improvements had not been used since the permit expired on June 18, 1967, and had been extensively vandalized since then.

On appeal the Office of Appeals and Hearings agreed that the added improvements were unauthorized and constructed at the applicant's risk. It then stated that the determination of the use to which the land is to be put is a matter for the authorized officer to make under § 7 of the Taylor Grazing Act, as amended, 43 U.S.C. § 315f (1964), and that the permit was revocable and subject to the risk of non-renewal. After stating that the land was subject to lease under the Small Tract Act of 1938, 43 U.S.C. § 682a (1964) and that the regulation 43 CFR 2236.0-2(a)(1) 2/ prohibits the issuance of permits where the provisions of the existing public land law may be invoked, it held that the permit was properly rejected.

In his appeal to the Secretary the appellant denies that the land has increased in value, admits that the improvements have been vandalized but says he will repair them, claims that the proposed use is the only practical use for the land, and states that if he is issued a permit, he will try to exchange other land in the state for it. He also asserts that the construction of the improvements he built was authorized and that he will lose $18,500 if he is denied a renewal of the permit, that the regulations give him a preference right to a renewal and do not prohibit his proposed use of the land, and that rejection of his application for a renewal is arbitrary.

To begin with it is well to note the nature of a special land use permit. It is not authorized by any specific statutory provision, but is issued under the general authority of the Secretary to administer the public lands for special purposes not provided for by existing law. It cannot be for a period exceeding five years. It grants only a limited right to use the land for a designated purpose and does not segregate the land from entry or other purposes under the public land laws. It is revocable for breach of conditions and also in the discretion of the authorized officer if he determines the land should be devoted to another use. Upon its expiration, the permittee will be considered a preferred applicant if no superior claim to the land has been asserted. 43 CFR 2920.0-2, 2920.3, F. Lowell Ruby, A-30623 (January 18, 1967).

While Bowlin indicated on his application that he was requesting a renewal of a permit, he was not the permittee under the last permit

2/ Now 43 CFR 2920.0-2(a); 35 F.R. 9667 (1970).

and his application was filed over a year after it expired. His status then is essentially that of a new applicant, not a preference applicant.

Further, while the loss that Bowlin says he will suffer is not to be lightly disregarded, the risk of such a loss was inherent in his acceptance of so limited an interest in land as a special land use permit.

The record indicates that the state office desires to keep the land available for exchange purposes and is of the opinion that the operation of a business on it under a permit would make the completion of an exchange difficult. The issuance of a permit would not be in the public interest and the refusal to issue one was a proper exercise of discretion.

The Office of Appeals and Hearings, while agreeing that the permit should not be issued, based its decision on the concept that a permit could not be issued for land eligible for disposal under the Small Tracts Act, as it found this tract to be. Since the determination to classify land as suitable for leasing as a small tract also lies within the discretion of the Secretary (or his delegate) and since the same considerations would be controlling, we do not find it necessary now to decide under which alternative the application should be rejected. It is enough that Bowlin's application was properly rejected even assuming a special land use permit could have been issued for the land. 3/

In accordance with 43 CFR 2920.5(d), 35 F.R. 9668, Bowlin may, within the time specified by the authorized officer, remove all structures which have been placed upon the premises by him or his assignor. If the permittee fails to remove the structures within the time required by the authorized officer, the structures will become the property of the United States.

3/ Whether the land is subject to disposition as a small tract depends upon the effect on it of several executive and public land orders. See Executive Order No. 7743, November 19, 1937, 2 F.R. 2524; Executive Order No. 7908, June 9, 1938, 3 F.R. 1389; Executive Order No. 10355, May 5, 1952, 17 F.R. 4831; Public Land Order 4194, April 12, 1967, 32 F.R. 6138; Executive Order 11230; June 28, 1965, as amended, 3 U.S.C. p. 46 (Supp. V, 1964). See also Lewis v. GSA, 377 F. 2d 377 (9th Cir., 1967); Bobby Lee Moore, et al., 72 I.D. 505, 508-509 (1965); Solicitor's Opinion M-36659, 70 I.D. 429, 431 (1963); Solicitor's Opinion, M-34331, 59 I.D. 313, 315-316 (1946); Thomas C. Kendall, A-26256 (October 31, 1951), 43 CFR 2730.0-3.

Therefore pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 211 DM 13.5, 35 F.R. 12081, the decision of the Bureau of Land Management is, for the reasons stated herein, affirmed.

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Martin Ritvo, Member

I concur:

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Francis Mayhue, Member

I concur:

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Anne P. Lewis, Member